

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Annual Assessment of the Status of)	
Competition in Markets for the)	MB Docket No. 06-189
Delivery of Video Programming)	

To the Commission:

**REPLY COMMENTS OF
THE AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (“APPA”) respectfully submits these reply comments in response to the Federal Communications Commission's *Notice of Inquiry (NOI)* in the above captioned proceeding. In the *NOI*, the Commission seeks information, comment and analysis regarding the state of competition in the market for the delivery of video programming and barriers to such competition. APPA’s comments demonstrate the public benefits of head-to-head facilities-based competition in the delivery of video and broadband services, and focus on the need for the Commission to take decisive action to eliminate discriminatory and anticompetitive activities surrounding program access, and access to multiple dwelling units.

I. Introduction

APPA is a national service organization that represents the interests of more than 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities developed in communities that were literally left in

the dark as electric companies in the private sector pursued more lucrative opportunities in larger population centers. Residents of these neglected or underserved communities banded together to create their own power systems, in recognition that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities – including Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, approximately 70 percent of APPA’s members serve communities with less than 10,000 residents. At present, public power systems operated by municipalities, counties, authorities, states and public utility districts provide electricity to approximately 43 million Americans.

The patterns that marked the evolution of the electric power industry are now repeating themselves in the communications industry. As incumbent private communications providers focus on establishing or further entrenching themselves in large population centers, many smaller communities are at risk of falling behind in obtaining the full benefits of the Information Age. These benefits include vigorous economic development, rich educational and occupational opportunity, affordable modern health care, and high quality of life. In response, municipal utilities around the country once again have come together to serve their communities by deploying sophisticated broadband communications networks capable of providing video, voice and data services, including some of the only fully operational, community-wide, fiber to the home (FTTH) networks in the nation. Many of these networks are the result of public-private partnerships.

II. MUNICIPAL UTILITY NETWORKS CONTINUE TO EXPAND SERVICE AND FACILITATE COMPETITION IN THE DELIVERY OF VIDEO PROGRAMMING

At the outset, APPA urges the Commission to view the annual report as more than a mere passive compilation of data, but instead to use it as a foundation for the adoption of more pro-competitive rules and as an opportunity to advocate statutory changes that will better ensure the development of viable competition in the multichannel marketplace. APPA is therefore heartened by the fact that, as part of the *NOI*, the Commission has requested comments on barriers that impede competition, and that the Commission has specifically asked interested parties to identify specific rules, policies or regulations that ought to be re-examined in light of current multichannel video programming markets. The Commission should actively utilize such information to eliminate all barriers to competition.

A. Services Offered by Municipal Utilities

In its *NOI* the Commission has sought information regarding the provision of video services by municipal authorities, and the extent to which they are combined with other services. There are currently well over 100 municipal utility broadband systems providing video services in every region of the country. The majority of these systems provide broadband Internet access in combination with the video service offerings, and many of them provide voice telephony services as well. In most cases consumers receive a price discount on the individual services if they take multiple services as part of a package.

Despite a seemingly endless number of legal, regulatory and competitive obstacles being thrown up by incumbent providers, municipal utility broadband

systems continue to thrive, building newer and more robust networks, offering additional services, and achieving higher customer penetration rates. A recent APPA survey of municipal utility broadband service providers indicated an average subscriber penetration rate of over 50 percent of the homes passed. The utilities indicated that more than 40 percent of these subscribers purchase a combination of video and high-speed Internet access services, and a significant number purchase voice, video and data services from the municipal network.

B. Facilities-Based Competition Provides Significant Benefits

In the *NOI*, the Commission inquired about the effects that competitive broadband service providers, including municipal providers, have had on the communities they serve.

In response to this inquiry, APPA conducted a survey of its member utilities that offer video services. The survey confirmed that, in virtually every instance, the incumbent cable operator significantly lowered its prices and/or offered additional services in response to the competition introduced by the municipal utility. Typically, in the communities surrounding the market served by the municipal utility, including neighboring communities that the incumbent served from the same head-end that it used to compete with the municipal utility, the incumbent did not drop its rates and introduced more frequent rate increases.¹ The experience

¹ Incumbents have sometimes dropped their rates so far below their prevailing rates, and maintained them for extended periods of time, that their intent cannot be seen as anything other than predatory. *See, e.g.,* <http://www.dailytidings.com/2005/0303/030305n1.shtml>.

of APPA's members thus confirms that head-to-head competition greatly benefits the communities in which it exists.

C. Barriers to Competition Still Exist

Noting that the market share of incumbent cable operators nationwide has decreased, the Commission has asked whether competitive service providers still face barriers to entry. APPA urges the Commission not to give undue weight to the relatively small decline in the incumbent's overall market share, particularly since aggregate market-share data do not differentiate between major market and smaller markets of the kind that are served, or would be served, by municipal utilities in the absence of barriers to entry. In the latter, barriers to entry are still a significant problem.

As the Commission's own numbers demonstrate, incumbent cable operators continue to dominate the multichannel video program distributor ("MVPD") marketplace nationwide.²

Moreover, the massive industry consolidation that has taken place over the past few years has effectively concentrated this market power at an unprecedented level into a handful of multiple system operators. As a result, the largest incumbent operators have an even greater ability to engage in anticompetitive

² The Commission's *Twelfth Annual Report* found that while competitive alternatives and consumer choices are beginning to develop, cable television continues to be the primary delivery technology for the distribution of multichannel video programming with 69% of all MVPD subscribers still receiving video service from the incumbent operator. *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Twelfth Annual Competition Report*, MB Docket No. 05-255, adopted February 10, 2006.

activities, often at the expense of consumers who desire more choice, better service and lower rates. Given the concentrated nature of the MVPD environment and the elimination of rate regulation for most cable services, it is extremely important that the Commission take every opportunity to act aggressively to foster competition in the video services market by removing unfair, monopoly-derived advantages, wherever and whenever possible.

Similarly, the Commission should not place undue reliance on the ability of direct broadcast satellite (“DBS”) service alone to bring about competition in the multichannel video marketplace. DBS does not currently provide many of the local programming options that consumers’ desire,³ let alone the integrated bundle of voice, video and data services that the large incumbent operators are beginning to deploy.⁴ Nor has DBS kept incumbent cable rates in check. As indicated above, municipal entry has resulted in significant rate decreases in communities served by municipal utilities but not in the surrounding communities. If DBS were truly effective in disciplining incumbent cable rates, such disparities could not exist.

Accordingly, the Commission should not take undue comfort from the presence of DBS and should resist the urge to find that markets are competitive because of the availability of DBS. Rather, the Commission should focus more

³ While DBS has been granted legislative relief to carry local broadcast signals, it is not expected to carry local channels for most smaller communities for many years.

⁴ APPA agrees with the Broadband Service Providers Association (“BSPA”) that DBS has not had an impact on pricing and services comparable to that of wireline competition. BSPA, Comments at 8.

attention on the promoting and protecting competition from terrestrial video service providers, including municipal utility systems.

III. The Commission Must Eliminate Anticompetitive Practices

A. Exclusive Programming Is Inherently Anticompetitive

While competitive BSPs, have established “beachheads” of competitive choice in a growing number of communities, abusive and discriminatory practices by incumbent operators and cable program providers threaten to erode these gains. Municipal utilities and other BSPs did not enter into the multichannel video services marketplace under the naive illusion that the incumbent providers would lay down in the face of competition. To the contrary, APPA’s members and other BSPs anticipated vigorous competition for subscribers. They did, however, expect to compete fairly for such subscribers. Unfortunately, BSPs have encountered barriers to fair competition, in the form of exclusive dealing agreements between a number of important content providers and the incumbent cable systems.

Exclusive program access arrangements involving regional sports programming are especially damaging to the ability of new entrants to effectively compete against large Multiple System Operators (“MSOs”). In many areas of the country, particularly in smaller communities, access to popular regional sports programming is essential to the success of a new cable provider. As far back as its *Fifth Annual Competition Report* the Commission recognized the critical importance of access to regional sports programming noting: *"sports programming in the market for the delivery of video programming increasingly warrants special*

*attention because of its widespread appeal and strategic significance for MVPDs."*⁵ Further, the Commission observed that *"[l]ocal sports also holds value for operators because local sporting events often generate higher ratings than other cable and broadcast programming."*⁶

The significance of regional sports programming is illustrated by the fact that in many instances, an incumbent cable operator with a poor service record will be able to retain customers in the face of competition if the competitor's service does not include popular regional sports programming. In such situations, the incumbent is not competing on the merits of its service but on its ability to unfairly leverage its size and incumbency.

And yet, almost nine years after the Commission recognized the critical importance that access to regional sports programming plays in the development of competitive cable offerings, the Commission has continued to allow such exclusive agreements to exist by virtue of the so-called "terrestrial loophole," -- an exception to the prohibition on exclusive programming agreements that has been interpreted as only applying to satellite delivered programming.⁷ If the Commission continues to interpret the terrestrial loophole as a statutory provision that ties its hands, it should at a minimum urge Congress to amend the law so as to free the Commission to deal with such patently anticompetitive practices.

⁵ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Competition Report*, CS Docket No. 98-102, adopted December 17, 1998, ¶ 171.

⁶ *Fifth Annual Competition Report*, ¶ 175.

Further, unless extended by the Commission, the prohibitions on program exclusivity will expire in October 2007. Given the importance of fair access to programming by all competitors, the Commission must take steps to extend the rules concerning program access.

B. Retransmission Consent

In the *NOI*, the Commission sought comments on the “retransmission consent process, including the effect of retransmission consent on cable rates, the ability of small cable operators to secure retransmission consent on fair and reasonable terms and the impact of agreements that require the carriage of non-broadcast networks in exchange for the right to carry local broadcast stations on MVPD and consumers.”⁸ APPA agrees with a variety of commenters that the major broadcast networks and their affiliates have been able to use the current retransmission consent and non-duplication rules to unfairly leverage their position to demand exorbitant compensation for their programming. As The Coalition for Retransmission Consent Reform correctly notes, the major broadcasters have been able to use the retransmission consent rules essentially to coerce cable operators into making large cash payments that will ultimately result in consumers paying higher prices for cable service.

The current retransmission consent rules are particularly burdensome on small new entrants, such as municipal systems, that must carry the major networks

⁷ The prohibition on exclusive programming and the terrestrial loophole are found in 47 U.S.C. § 548.

⁸ *NOI* at ¶ 38.

if they expect to remain competitive, but which lack the size and scale of their incumbent MSO competitors to negotiate volume discounts. Accordingly, APPA joins with other commenters in urging the Commission to undertake an inquiry to consider what steps it can take under its current authority to revise the retransmission consent rules to ameliorate these abuses and better protect consumers. As a starting point to such an inquiry, the Commission should consider the rule changes suggested by the American Cable Association (“ACA”) in its 2005 petition for rulemaking to revise the retransmission consent rules.⁹ The ACA petition proposed that the Commission make three “adjustments” to the retransmission consent rules:

- Maintain broadcast exclusivity for stations that elect must-carry or that do not seek additional consideration for retransmission consent;
- Eliminate exclusivity when a broadcaster elects retransmission consent and seeks additional consideration for carriage by a smaller cable company; and
- Prohibit any party from preventing a broadcast station from granting retransmission consent to a smaller cable company.

Under ACA’s proposal, a small cable operator could seek programming from a distant provider if a local broadcaster sought to charge cash or other consideration for retransmission consent. In effect, small cable operators would use the discipline of the marketplace to moderate the retransmission consent demands of local broadcasters.

⁹ ACA, *Petition for Rulemaking, In the Matter of Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103; Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, MB Docket No. RM-11203 (filed March 1, 2005).

In addition, APPA concurs with the Coalition for Retransmission Consent Reform, that the Commission's Thirteenth Annual Report should recommend that Congress review and reevaluate the impact that the current retransmission consent rules are having on the marketplace and on consumers.

C. Access to MDUs

Finally, APPA joins other commenters such as the BSPA, and the United States Telecom Association, in urging the Commission to adopt national rules to eliminate the ability of incumbents to use long-term exclusive access to multiple dwelling units ("MDUs") as an anticompetitive weapon to stifle competition and eliminate consumer choice. APPA's members, like other new entrants, have experienced the anticompetitive effects of exclusive MDU contracts. Moreover, given the fact that so many of the broadband networks being constructed today are based on a triple play model of offering voice, video and data, it is not cost effective if the video component is pulled out of the mix as a result of an exclusive MDU agreement that prevents a new provider from offering video services.

IV. Conclusion

APPA applauds the Commission for its desire to make competitive video services and broadband capabilities available to all Americans, including those in the communities that APPA's members serve. In this *NOI*, the Commission has raised important policy questions concerning the state of video competition. APPA's comments demonstrate the public benefits of head-to-head facilities-based competition in the delivery of video and broadband services. In order to ensure that the promise of such competition is realized, the Commission must not prematurely

relax competitive and consumer safeguards, but must instead maintain a commitment to act vigorously to ensure against anticompetitive practices by incumbent providers.

Respectfully submitted,

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